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SUPREME COURT, U.S.
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In the Supreme Court of the United States

OCTOBER TERM 1958

No. 763

SOUTHERN PACIFIC COMPANY, a corporation,
Appellant,

vs.

THE CORPORATION COMMISSION OF ARIZONA, and WILLIAM T. BROOKS, JOHN H. BARRY and MIT SIMMS, as members of and comprising said Commission, and THE CITY OF TUCSON, a municipal corporation,
Appellees.

Appeal from the Supreme Court of the State of Arizona

Appellant's Brief in Opposition to Appellees' Motion to Dismiss

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Foreword

In support of their Motion to Dismiss, appellees make two principal contentions: (1) This case involves solely the matter of public safety at a rail-highway grade crossing, and therefore the state in the exercise of the police power has the right to impose upon the appellant railroad the

entire expense of flashing signals at the crossing (Motion, pp. 3-10); and (2) recent decisions of this Court holding that the expense of grade-crossing improvements must be allocated fairly and reasonably are not in point (Motion, pp. 10-11).

These two contentions are really capable of being stated as a single proposition: i.e., that in a situation (e.g., a grade crossing) where "safety" is the claimed purpose of a desired improvement, the power of the state is unrestricted, and nothing other than safety need be considered. We shall therefore discuss first the application and controlling effect of the two recent decisions upon which appellant largely relies, and thereafter the "safety" argument advanced by appellees.

1. The Decisions of This Court in the Nashville and Atchison Cases Are Directly in Point.

The two recent decisions of this Court which appellant believes to be controlling here are: *Nashville, C. & St. L. Ry. v. Walters*, 294 U.S. 405 (1935), and *Atchison, T. & S.F. Ry. v. Public Util. Comm.*, 346 U.S. 346 (1953).

The *Nashville* case is reviewed at some length in appellant's Jurisdictional Statement (at pp. 18-22), and to avoid repetition we ask the Court to refer to that discussion. Appellees assert (Motion, p. 10) that *Nashville* is not in point here because the case "had no relation to the safety of the public", and the grade-crossing improvement there involved "was not premised upon consideration of local safety needs". The facts are that *this* Court, after a review of the entire record before the Tennessee courts (including evidence showing that substantial considerations other than safety were involved), held that the improvement was not "prescribed upon consideration of local safety needs", but rather to promote the rapid movement of highway traffic

(294 U.S., p. 425). In so concluding, however, this Court exercised its own independent judgment, and was not precluded by the findings and observations of the Supreme Court of Tennessee. That Court had expressly stated (see its opinion, 71 S.W. 2d 681, at p. 683) that the action of the state authorities had been undertaken "to promote the safety of persons at grade crossings"; and its decision sustaining the arbitrary 50 per cent allocation against the railroad was rested upon that conclusion. Other matters were (as this Court remarked, 294 U.S., p. 433) held by the Tennessee Court "to be without legal significance".

In particular, the Tennessee Court had declined to treat as material any facts tending to show that the allocation prescribed by the Tennessee statute was other than fair and reasonable. The statute was treated by the state court as conclusive.

The case at bar, in the posture in which it reaches this Court, is precisely on all fours with *Nashville*. The state statute before the Court here has been construed by the highest court of Arizona as requiring that an arbitrary and invariable 100 per cent allocation be assessed against the railroad, regardless of the relevant facts, whenever a grade-crossing improvement is installed. As stated, the Tennessee statute involved in *Nashville* was likewise construed as providing for an arbitrary and invariable allocation. There is also presented here a claim, assertedly supported by findings in the tribunals below, that the "public safety" is the only reason, basis, purpose, or result of the improvement. Such was exactly the position of the appellee state authorities in *Nashville* (see 294 U.S., pp. 410-11). Finally, the Arizona Supreme Court has declined to consider or give weight to any evidence or argument except that which has to do with the supposed "safety" issue; and the tribunals below, being bound by the state court's earlier decision in-

volving the same general subject matter, have limited their consideration accordingly. This again is exactly what took place in the Tennessee Supreme Court in *Nashville*: see 294 U.S., pp. 414, 428, 432; 71 S.W. 2d, p. 683.

The fact is that the Supreme Court of Arizona in this case has followed, almost to the letter, the pattern of the action taken by the Supreme Court of Tennessee in the *Nashville* case; and this has occurred notwithstanding that the *Nashville* decision, though previously cited to the Arizona Court, has not been mentioned by that Court in any of its three recent opinions dealing with grade-crossing improvements. It is apparent that the Arizona Court could find no way of distinguishing *Nashville* from the cases before it.

Appellees' assertion that *Atchison* is not in point also rests upon a claim that the case did not involve safety at a grade crossing (Motion, p. 11). This claim is likewise not supported by the facts. The appellee state commission in *Atchison* had held, in its opinions, that safety was a material factor, and rested its orders in large part upon safety considerations: see 51 Cal. P.U.C. Repts. 771, at pp. 776, 779; 51 Cal. P.U.C. Repts. 788, 789, 795. This Court also noted (346 U.S., p. 351) that the improvements had been instituted to meet transportation needs, "and further safety. * * *"

In fact, the accident record at the grade crossing involved in *Atchison* was much like the corresponding record in the case at bar. Appellees have noted that this Court said (346 U.S., at p. 351): "Several relatively minor accidents have occurred there during the last 25 years." This comment might be repeated in the present case, with only minor modifications.

The essential holding in *Nashville* and *Atchison* is that although safety considerations may be involved, or even (as in *Nashville*, and again here) claimed by the state author-

ities, and declared by the State Court, to be the sole basis for the proposed improvement, the cost allocation must still be fair and reasonable, and may not be made arbitrarily and without consideration of the relevant facts. In particular, the allocation cannot be made upon the basis of a statutory command which ignores material facts or prohibits their consideration. Precisely such an allocation was made in *Nashville,* and this Court in effect held it to be arbitrary and unreasonable. On the other hand, the allocations in *Atchison* were not based upon an inflexible statutory formula, but instead were held by this Court to have been made after full consideration of "all the evidence offered", and were therefore sustained.

In the case at bar the allocation was not (and could not have been) based upon consideration of evidence bearing upon apportionment of the cost. The State Supreme Court had held expressly, only about nine months prior to the State Commission's initial order in the present case (*Maricopa County v. Corporation Commn.,* 79 Ariz. 307, 289 P.2d 183, Oct. 31, 1955; Appendix E to the Jurisdictional Statement) that the state law did not permit such consideration, inasmuch as the statute was absolute in requiring the entire expense to be assessed against the railroad. From the standpoint of applicable principle the present case is not distinguishable from *Nashville;* and because of this Court's approval and affirmance of the *Nashville* principle of fairness and reasonableness, in the more recent *Atchison* decision, this case is likewise in line with and governed by the latter.

2. This Case Is Not Concerned Solely, or Even Primarily, with Safety; But Instead with the Avoidance of Delays to and Interferences with Motor Traffic Using the Crossing.

As noted above, appellees' basic contention is that nothing more is involved in this case than a simple question of pub-

lic safety at an allegedly hazardous grade crossing. Thus appellees make the general statement (Motion, pp. 6-7) that "a grade crossing signal case * * * is wholly based on the public safety * * * without involving the problem of the delay of traffic"; and again (Motion, p.7) that the Commission, as well as both the State Courts, had "each found and held that the * * * signals were required for the health and safety of" various groups of persons; and that therefore the requirement for such signals is a proper and reasonable exercise of the state's police power.

The issue between appellant and appellees is not whether the signals are desirable, or even "required"; but instead whether the essential facts bearing upon that supposed requirement, including such additional pertinent facts as might be shown upon further hearing, shall all be brushed aside, and the entire expense arbitrarily imposed upon appellant.

The claim of appellees that this case involves safety only is immaterial upon this appeal. The identical claim was made by the appellee state authorities in *Nashville,* and their claim was supported by the findings and conclusions of the Supreme Court of Tennessee; yet this Court had no difficulty in holding, in *Nashville,* and affirming, in *Atchison,* that such a claim does not foreclose inquiry into the fairness and reasonableness of the allocation of the expense. Certainly the like assertion here, even if valid, should have no greater effect.

Moreover, it cannot fairly be said here that safety considerations alone support the installation, or that the furtherance of the speedy movement of motor traffic is not an important purpose, just as this Court held in the *Nashville* case.

As this Court has recognized (*Southern Pacific Co. v. Arizona,* 325 U.S. 761, 778 (1945), *Railroad Retirement*

Board v. Alton R.R., 295 U.S. 330, 364 (1935)), frequencies of accidents in relation to an accepted base, such as exposure or performance, constitute a reliable method of measuring actual hazard. In the case at bar (as shown by the opinion of the State Supreme Court, quoted in part by appellees, Motion, pp. 7-8), there were nine accidents at this crossing during the 6-year period 1951-1956. During this same period there were on the average not less than 1.5 million vehicle movements per year over the crossing (3252 per day in 1953, 5329 in 1956). Thus the frequency of accidents at the crossing was not more than one for each million vehicle crossings.

Nevertheless, appellees deny (Motion, pp. 8-9) that one of the reasons for the flashing signals is to reduce or do away with delays to motor traffic at the crossing, even though offering nothing to support this denial except their references to the "safety" findings of the Commission and the courts below. The opinion of the State Supreme Court shows that at certain points on the roadway approaching the crossing the view of the tracks is limited. At points closer to the crossing, however, a complete view may be had in both directions. In the absence of flashing lights, a motorist must stop at these latter points, or at least slow down, so as to observe the tracks and be able to stop if a train is approaching. At times of heavy traffic, morning and afternoon, this stopping may result in serious congestion; for the roadway carries 225 vehicles per hour on the average, and a much greater volume during rush periods. With the flashing signals, no such stopping or slowing down is needed unless the lights are actually flashing. Since there are comparatively few rail movements (one each half hour on the average), the presence of the signals is certain to accomplish marked reductions in traffic delays.

To support their general argument that the challenged allocation is not in violation of the constitutional provisions relied upon by appellant, appellees cite (Motion, pp. 4-7, 9) a number of earlier decisions of this Court involving railroad-highway crossings, particularly:

Chicago, B. & Q. R.R. v. Chicago, 166 U.S. 226 (1897);
Cincinnati, I. & W. Ry. v. Connersville, 218 U.S. 336 (1910);
Chicago, M. & St. P. Ry. v. Minneapolis, 232 U.S. 430 (1914);
Atlantic Coast Line R.R. v. Goldsboro, 232 U.S. 548 (1914);
Missouri Pacific Ry. v. Omaha, 235 U.S. 121 (1914); and
Erie R.R. v. Public Util. Commrs., 254 U.S. 394 (1921).

Three cases of this group (the *Erie* case, the *Chicago, M. & St. P.* case and the *Missouri Pacific* case) were cited to this Court in the brief for the appellees in the *Nashville* case, and in support of virtually the same contentions now made (see 294 U.S., p. 410). These same three cases, together with the *Cincinnati* and *Atlantic Coast Line* cases, were also referred to, in several instances more than once, in either the text of the *Nashville* opinion or the footnotes (see 294 U.S., pp. 413, 415, 430, 431).

The same three cases were also cited to this Court by the appellees in the *Atchison* case (see 98 L. Ed., pp. 56, 57); and together with the *Cincinnati* case, were cited in this Court's opinion as supporting the proposition that: "This Court has consistently held that in the exercise of the police power, the cost of such [grade-crossing] improvements *may be* allocated all to the railroads" (346 U.S., p. 352; emphasis

as in the original). Immediately following the citation, this Court said further: "There is the proper limitation that such allocation of costs must be fair and reasonable", and cited the *Nashville* case.

Thus all the decisions relied upon by appellees in this behalf, other than the early *Chicago* case, were also cited and considered in the *Nashville* and *Atchison* cases; and it can hardly be said that appellees' argument, or the citations upon which they rely, present any matter of substance not heretofore fully considered by this Court. The cited decisions clearly did not militate against the reversal of the arbitrary allocation challenged in *Nashville;* nor did they, upon subsequent consideration (in *Atchison*), serve to modify the principle of *Nashville;* and these decisions should not, we submit, have any greater or different effect in the case at bar.

Conclusion

The ultimate question presented here is whether, in a case involving the improvement of a grade crossing by installing flashing lights, a state may ignore decisions of this Court which are directly in point, and instead of giving due consideration to the material facts, may arbitrarily impose the entire expense upon the railroad. There is no doubt that the state tribunals have failed to consider any facts except those tending to show that this crossing might be held "hazardous". There is likewise no doubt that the controlling decisions of this Court have not been followed: in fact, the *Nashville* case has not even been mentioned in the opinions of the State Supreme Court.

In these circumstances, a federal question of importance is presented under the due-process and equal-protection clauses of the Fourteenth Amendment, and the Commerce clause, within the appellate jurisdiction of this Court, which

questions should be resolved by the Court upon full briefs and argument. The Motion to Dismiss should be denied.

Respectfully submitted,

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Dated May 11, 1959.